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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JENNIFER LOEFFLER, Plaintiff and Appellant, v. TOYOTA MOTOR CREDIT CORPORATION, et al., Defendants and Respondents.	G058386 (Super. Ct. No. 30-2017-00938865) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Reversed. Motion for sanctions withdrawn. Motion to strike respondents' appendix and motion to augment the record on appeal denied.

Steven Lewis Rader for Plaintiff and Appellant.

Hallstrom, Klein & Ward and David J. Hallstrom for Defendants and Respondents.

Plaintiff Jennifer Loeffler appeals from a judgment entered after a bench trial, arguing the trial court erred by refusing her relief from her jury trial waiver. On appeal, plaintiff also moved to strike portions of the respondents' appendix, to augment the record, and for sanctions. Plaintiff withdrew her motion for sanctions at oral argument.

We deny the remaining motions but conclude defendants failed to show they would be prejudiced by relief from plaintiff's jury trial waiver after the trial was continued, following *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1 (*Mackovska*). In the absence of a showing of prejudice, the trial court abused its discretion by denying plaintiff relief, and we therefore reverse.

FACTS

Defendants Toyota Motor Credit Corporation and Tustin Lexus are an automobile financing company and an automobile dealership, respectively. Plaintiff leased an automobile from Tustin Lexus, which assigned the lease to Toyota Motor Credit Corporation. Plaintiff sued defendants for various causes of action arising from the lease negotiations.

Plaintiff's initial case management statement requested a nonjury trial. Toyota Motor Credit Corporation's initial case management conference statement requested a jury trial. At the initial case management conference, no trial date was set, as Tustin Lexus had not yet been served. At the continued case management conference, the court set a jury trial at defendants' request. Defendants deposited their jury fees the same day; plaintiff never did so.

A few months before the scheduled trial date, defendants applied ex parte to continue the trial. The application was granted and the trial, still set for a jury, was rescheduled. Three weeks before the new trial date, defendants gave notice of "withdrawal" of their jury fees and requested the matter proceed by court trial. On the day of trial, plaintiff orally requested a jury trial, but the court found plaintiff had waived

the right to a jury trial, and instead ordered the matter to proceed by bench trial. The matter was trailed and ultimately continued for a period of five months after plaintiff used a peremptory challenge on the judge to whom the case was reassigned. During the five-month continuance period, plaintiff moved for reconsideration of the court's order denying plaintiff relief from her jury trial waiver, but the motion was denied. The court found defendants would be prejudiced by reinstating a jury trial because defendants had not prepared for a jury trial.

The matter proceeded to a court trial, at which defendants prevailed. Plaintiff timely appealed.

After filing her notice of appeal, plaintiff also filed her notice of designation of the record, specifically electing to proceed without a record of the oral proceedings in the trial court. Defendants raised the lack of a reporter's transcript in their brief, in response to which plaintiff moved to augment the record by inclusion of the transcript. Plaintiff also moved to strike portions of the respondents' appendix.

DISCUSSION

1. Plaintiff's Motion to Strike

After defendants submitted their appendix, plaintiff moved to strike certain portions of the appendix for violation of California Rules of Court, rule 8.276(a)(2), and sought sanctions. Specifically, plaintiff asks us to strike certain notices of ruling on discovery motions, a motion for terminating sanctions, a Doe amendment to plaintiff's complaint, and defendants' trial brief.

Defendants argue these documents are relevant to their contention that plaintiff's gamesmanship was or should have been a motivating factor in denying plaintiff's request for relief from her jury trial waiver. We do not find defendants' arguments on this "gamesmanship" issue frivolous, and the documents defendants provide in their respondents' appendix are at least somewhat logically connected to the

gamesmanship issue (although we ultimately find them unpersuasive). Therefore, we decline to strike any portion of the appendix.

2, Plaintiff's Motion to Augment the Record

After defendants submitted their respondents' brief, plaintiff also moved to augment the record to include the reporter's transcript of the hearing on plaintiff's motion to reconsider the trial court's order refusing plaintiff relief from her jury trial waiver. There was no testimony at the hearing, and the sole issue presented by this case is a purely legal one: whether defendants showed they would be prejudiced if plaintiff were permitted relief from her jury trial waiver. (*Mackovska, supra,* 40 Cal.App.5th at p. 10.) Review of the transcript reveals nothing new or different from the parties' briefing on plaintiff's motion for relief and the trial court's minute order explaining its decision. Therefore, we deny the motion to augment.

3. Plaintiff's Request for Relief from Waiver of Jury Trial

The sole issue raised by plaintiff on appeal is whether the trial court erred by refusing to permit plaintiff a jury trial after she initially waived that right.

This issue was raised and carefully analyzed in *Mackovska*, a remarkably similar recent case in the Second District. "A party in a civil case may waive the right to a jury trial under [Code of Civil Procedure] section 631 in several ways, including by failing to deposit jury fees 'on or before the date scheduled for the initial case management conference in the action.' [Citations.] Even when a civil litigant waives his or her right to a jury trial, however, the trial court has discretion to 'allow a trial by jury.' [Citations.] The trial court should grant a motion for relief of a jury waiver 'unless, and except, where granting such a motion would work serious hardship to the objecting party.' [Citations.] When there is doubt about whether to grant relief from a jury trial waiver, the court must resolve that doubt in favor of the party seeking a jury trial. [Citations.] [¶] In a motion for relief from waiver of a jury trial, the crucial question is whether the party opposing relief will suffer any prejudice if the court grants relief.

[Citations.] '"The prejudice which must be shown from granting relief from the waiver is prejudice from the granting of relief and not prejudice from the jury trial."' [Citation.] 'The mere fact that trial will be by jury is not prejudice per se.' [Citation.] Denying relief where the party opposing the motion for relief has not shown prejudice is an abuse of discretion." (*Mackovska, supra*, 40 Cal.App.5th at pp. 9-10.)

In *Mackovska*, the case was initially set for a jury trial, but the plaintiff waived his right to a jury trial by failing to deposit his jury fees. (*Mackovska, supra*, 40 Cal.App.5th at p. 7.) When the defendants applied ex parte for a trial continuance, the court took note of the plaintiff's failure to deposit the fees and continued the trial, resetting it as a court trial. (*Ibid.*) The plaintiff then moved for relief from the jury trial waiver, but his motion was denied after the defendants argued they would be prejudiced by the additional expense of a jury trial. (*Id.* at pp. 7-8, 10-11.) At the conclusion of the trial, the court ruled in the defendants' favor and sanctioned the plaintiffs for bringing their action frivolously and in bad faith. (*Id.* at pp. 8-9.)

The Court of Appeal reversed. (*Mackovska*, *supra*, 40 Cal.App.5th at p. 18.) The court held the defendants' assertion of the additional cost of a jury trial was insufficient to demonstrate prejudice. (*Id.* at p. 11.) The court also found it persuasive that the case was reset for court trial only days before the initially scheduled trial date, and that the trial continuance granted to the defendants at the same time as the case was reset for court trial also gave them additional time to prepare for a jury trial. (*Ibid.*) The court also held the plaintiff need not prove he was prejudiced by the erroneous denial of his motion for relief from the jury trial waiver because denial of the right to a trial by jury is "'per se prejudicial.'" (*Id.* at p. 13.)

The factual similarities between *Mackovska* and the instant case are remarkable. Just like in *Mackovska*, plaintiff waived her right to a jury trial by failing to deposit her jury fees (although here plaintiff also requested a court trial in her case management statement). Just like in *Mackovska*, the case was initially set for jury trial, at

defendants' request, and remained set for jury trial until just days before the scheduled trial date. Plus here, as in *Mackovska*, plaintiff moved for relief from the waiver and defendants argued they would be prejudiced by the burden and expense of preparing for a jury trial, even though the trial date had been continued months out, giving time for such preparation. And just like in *Mackovska*, the trial court denied plaintiff's motion, this time expressly based on the conclusion that "[n]o preparation [had been] made for a Jury Trial."

Consequently the same result must obtain. We conclude, as the *Mackovska* court did: relief was mandatory and the refusal to grant it was an abuse of discretion. The prejudice described by the trial court (the increased cost of preparing for a jury trial) is not the sort of prejudice that can be taken into account in connection with this type of request because it is prejudice from the jury trial itself, not from the request for relief. Moreover, the record here undercuts this justification factually as well because this case had been set for jury trial until just 21 days before the initial trial date.

Defendants raise many arguments to attempt to distinguish this case from *Mackovska*, or to reach a different result. None are meritorious.

Defendants argue plaintiff must show prejudice from the court trial to prevail and attempts to distinguish the various cases stating a contrary rule by categorizing the jury waivers involved therein as "inadvertent." In support of this proposition, defendants cite *Mackovska* itself, as well as *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, and *Byram v. Superior Court* (1977) 74 Cal.App.3d 648.

But *Mackovska*, by far the most recent and factually analogous case, says the exact opposite: "When addressing '"a right so fundamental as to be characterized by our Constitution as one which should 'remain inviolate,' the court should only deny the privilege thus accorded"' where '"some adverse consequence will flow"' from a party's *change of heart*." (*Mackovska, supra*, 40 Cal.App.5th at p. 17, italics added.) And

Mackovska itself contains persuasive arguments against the language in *Gann*, *McIntosh*, and *Byram* upon which defendants rely, going so far as to specifically reject those cases on the subject of prejudice. (*Mackovska*, at pp. 13-17.) In any event, the rule in this division is clear: "Denial of the right to a jury trial is reversible error per se, and no showing of prejudice is required of a party who lost at trial." (*Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 493.)[1]

Defendants argue the absence of a reporter's transcript is fatal to plaintiff's appeal, citing numerous cases.[2] But these cases invariably involved either a trial, an evidentiary hearing, or a dispute over whether some meaningful event took place at the unreported hearing. And most of them turned on the well-understood principle that the appellant must demonstrate error in the record on appeal. Here, the parties do not contend anything meaningful occurred at the hearing, beyond legal arguments.[3] And the subsequent trial is irrelevant to the sole issue raised on this appeal. Moreover, the minute order denying plaintiff's motion to reconsider itself makes plain the court's error insofar

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[1] It is also somewhat surprising given their own position that defendants would focus so intently on the voluntary nature of plaintiff's jury trial waiver, and her subsequent change of heart. Defendants, it should be remembered, initially requested a jury and also changed their minds and withdrew their jury request just three weeks before. In fact, it is arguably *defendants'* last-minute change of heart that created this controversy, not plaintiff's.

[2] Defendants cite *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, *In re Valerie A.* (2007) 152 Cal.App.4th 987, *Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, *In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, and *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, which itself cites several other such cases.

[3] As discussed above, plaintiff moved to augment the record and include the reporter's transcript of the hearing in response to this argument out of an abundance of caution. The transcript contains nothing that would impact our analysis on these issues, and we therefore deny the motion.

as it (1) deemed the cost of jury trial preparation prejudicial to defendants; and (2) concluded no jury trial preparation had been undertaken, even though the matter had been set for a jury trial until, at the earliest, 21 days before the initial trial date. Thus, even without the transcript of the hearing, plaintiff has demonstrated error in the record.

Defendants next argue plaintiff's failure to seek writ relief instead of waiting for the conclusion of trial to appeal demonstrates gamesmanship. But here, again, *Mackovska* rebuts defendants' argument: "Where, as here, the party makes a timely request for relief from a jury trial waiver and neither the other party nor the court would suffer prejudice as a result of that request, the concerns expressed by the court in *Tyler* [*v. Norton* (1973) 34 Cal.App.3d 717 regarding gamesmanship] do not exist. The Supreme Court has made clear that such improper gamesmanship arises when a party loses a case after proceeding with a court trial *without objecting to the absence of a jury* and then complains the case was erroneously tried to the court. [Citations.] That did not happen here." (*Mackovska, supra,* 40 Cal.App.5th at p. 15.)

Defendants also argue plaintiff's request for relief from her jury trial waiver was mere gamesmanship, designed to create delay. This argument was arguably meritorious until the trial was continued for five months. At that point, the argument became untenable, as the period remaining before trial was now more than sufficient to accommodate a reversion to a jury trial. But the trial court still denied plaintiff's request for a jury trial, even after the continuance. Further, as discussed above, the type of "gamesmanship" ordinarily at issue in jury trial waiver cases involves proceeding through a court trial without objecting to the absence of a jury, and then asserting the jury right on appeal. (*Mackovska, supra,* 40 Cal.App.5th at p. 15.) No such gamesmanship is present here.[4]

[4] Again, defendants' focus on "gamesmanship" and last-minute tactical changes of mind is puzzling in light of defendants' own last-minute tactical choice to withdraw their jury request, which could easily be characterized as gamesmanship.

Last, defendants point to various discovery motions and to a last-minute Doe amendment as evidence of plaintiff's gamesmanship. The discovery motions have nothing to do with the jury trial issue, and as discussed above, imposition of a jury trial after the trial was continued would not have created any additional delay. Further, the Doe amendment was not before the trial court at the time of its decision on the jury trial issue, and we therefore decline to consider it.

We understand defendants' frustration at this result, and the waste of judicial resources in conducting a trial that was doomed from the outset to be overturned on appeal is also regrettable. But the right to a jury trial is "inviolate" in California, and the failure to conduct one when a party who has that right requests one is reversible error per se. (Cal. Const., art. I, § 16; *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc., supra*, 238 Cal.App.4th at p. 493.)

DISPOSITION

The judgment is reversed. Plaintiff shall recover costs on appeal.

THOMPSON, J.

WE CONCUR:

FYBEL, ACTING P. J.

IKOLA, J.